90-818 (1)

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

PAUL A. RICHTER, an individual dba "THE BODY SHOP", Petitioner,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

SEBASTIAN D'AMICO
Attorney at Law
2645 First Avenue
San Diego, CA 92103-6506
Telephone: (619) 232-5881

Attorney for Petitioner
PAUL A. RICHTER, an individual
dba "THE BODY SHOP"

QUESTIONS PRESENTED

1. Does the regulation of the First Amendment interest per se carry a presumption of constitutionality?
2. Is there an attendant "burden of proof" required to defend a constitutional challenge to regulation of a First Amendment interest?

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No. _____

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v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

On appeal from the Supreme Court of California

The Petitioner, PAUL A. RICHTER, respectfully prays that a Writ of Certiorari issue to review the order denying review after judgment by the Court of Appeal by the Supreme Court of California, entered in the

above-entitled proceeding on

August 15, 1990.

OPINION(S) BELOW

August 15, 1990 the order of the Supreme Court of the State of California denying review after judgment by the Court of Appeal, Fourth Appellate District, is reprinted and attached as Appendix "A".

The Opinion of the Court of Appeal, Fourth Appellate District, Division One of the State of California (Kremer, P. J.) filed May 25, 1990 has not been reported. It is reprinted as attached Appendix "B".

The Decision of the Superior Court of San Diego County, State of California, (James R. Milliken, Judge) filed March 3, 1989, has not been reported. It is reprinted as attached Appendix "C".

JURISDICTION

On February 22, 1989, the Superior Court of San Diego entered a Decision granting Respondents' Motion for Summary Judgment. Petitioner then appealed to the Court of Appeal, Fourth Appellate District, Division One, of the State of California on May 25, 1990. The Court of Appeal affirmed the Superior Court's Decision. The Petitioner then petitioned for review in the Supreme Court of the State of California. The Supreme Court denied the petition for review on August 15, 1990.

The jurisdiction of this Court to review the judgment of the Supreme Court of California is invoked under 28 U.S.C. §§1257 and 2101, Rule 10 of the rules of the Supreme Court of the United States.

STATUTE/MUNICIPAL CODE INVOLVED

San Diego Municipal Code, Chapter III, Article 3, Division 36, Section 33.3610:

"Sec. 33.3610 Nude Entertainment Business - Operating Requirements.

No person, association, partnership, or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of nude entertainment business unless each and all of the following requirements are met:

(a) Each person employed or acting as a nude entertainer shall have a valid permit issued pursuant to the provisions of this Division, and it shall be unlawful for any owner, operator, responsible managing employee, manager or permittee in

charge of or in control of a nude business to employ or permit any person to act as a nude entertainer who is not in possession of valid, unrevoked Nude Entertainer Permit, which permit shall be prominently displayed with the permit required of the business.

(b) The possession of a valid Nude Entertainment Business License does not authorize the possessor to perform services for which a Nude Entertainer Permit is required.

(c) It shall be unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of a nude entertainment business to allow any person below the age of eighteen (18) years upon the premises or within the confines of any nude entertainment

business.

(d) Nude entertainment services shall be conducted or carried on only between the hours of 6 a.m. and 2 a.m. of the following day.

(e) No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises. Regulatory only within this Article.

(f) No responsible person, as defined in this Article, shall permit or allow at licensed premises any patron to approach within six feet of a nude entertainer, or permit or allow a nude entertainer to approach within six (6) feet of a patron. Regulatory only within this Article.

(g) All employees of nude entertainment businesses, other than nude entertainers while performing,

shall, at a minimum while on or about the licensed premises, wear an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region, and the breasts of a female including the areola thereof. Regulatory only within this Article."

STATEMENT OF THE CASE

Petitioner operates a business offering theatrical demonstrations or exhibitions, amusements, and viewing by a knowingly consentual audience desirous of viewing same in the assertion of his/her/their First Amendment rights. Said business is located in the City of San Diego, County of San Diego, State of California. The conduct of Petitioner's business is authorized as a theatre under the San Diego Municipal Code ("SDMC") and a permit has been duly issued.

Respondent CITY did allegedly enact, adopt, and amend various sections of certain ordinances under the SDMC. More specifically, the section of certain ordinances which are the subject of this petition are

designated under Division 36, 33.3610. The Petitioner did not seek an exemption from regulation under Division 36 because Petitioner does not hold a license pursuant to Division 36. Respondent CITY notified Petitioner of its intention to sanction Petitioner by way of suspension of his theatre permit due to alleged violations of SDMC §§ 33.3610(e), (f) and (g). That is, alleged violation of the six (6) foot distance between patron and nude entertainer. Regulatory action was initiated to suspend Petitioner's theatre permit for thirty (30) days. This action led to an administrative hearing at which time the factual violations were stipulated and the matter was submitted on the legal issues. The hearing officer decided

to uphold the action of Respondent. However, he refused to rule on the constitutionality of the subject ordinances.

After the San Diego City Council denied Petitioner's appeal the San Diego Police Department issued a letter to petitioner on September 22, 1988, advising him that a thirty-day suspension would commence on October 1, 1988, thus putting petitioner out of business for said period.

Petitioner filed his Complaint in state court for Declaratory Relief and Injunctive Relief (to determine validity of ordinance) on September 30, 1988, and obtained a Temporary Restraining Order against the imposition of the subject suspension along with obtaining a

Preliminary Injunction against imposing same, issued November 20, 1988.

Respondents filed their Motion for Summary Judgment on November 30, 1988. Said Motion was heard on January 27, 1989. The Honorable James R. Milliken rendered his "Memorandum Decision" on the Respondents/Defendants' Motion on February 22, 1989 (Appendix "B"), and an Order for Entry and granting of same on March 3, 1989.

Petitioner filed his Notice of Appeal on March 8, 1989.

The thrust of said Memorandum Decision was based upon a finding that the subject ordinance, SDMC §33.3610(e),(f), and (g), withstands a constitutional challenge by Petitioner on the presumption of

favoring validity and the fact that mere doubt is not a reason for a judicial declaration of invalidity.

Petitioner's plea of error by the lower court in its determination based upon a presumption of validity of the type of ordinance involved was not persuasive when presented to the state appellate court.

The Petitioner's petition for review of the state appellate court's decision regarding constitutionality, and the mere presumption of validity of same, was denied by the State of California Supreme Court of the State of California.

REASONS FOR GRANTING THE WRIT

I

Presumption of Unconstitutionality Applies to City Ordinance Regulating the First Amendment Interest of Petitioner.

Petitioner challenged the constitutionality of an ordinance enacted by the Respondent, City of San Diego, in the form of a civil action for declaratory relief. The subject ordinance sought to regulate certain aspects of Petitioner's business which were protected by the First Amendment. More specifically, the regulation sought to limit the place, and manner of certain theatrical nude presentations presented by Petitioner by way of minimum distance requirements between patrons and the theatrical

nude performers.

The lower court granted an application for summary adjudication in favor of the Defendants/ Respondents, on the specific finding that the subject ordinance was presumed to be constitutional. The state court of appeal solidified said finding by way of affirmation.

By it's affirmation the state court of appeal ostensibly considered the dictates of the decision of the Supreme Court of the State of California in Morris v. Municipal Court (1982) 32 Cal.3d 533, and BSA, Inc. v. King County, (9th Cir. 1986) 804 F.2d 1104.

In the instant case there is a total void of any evidence in support of the proposition that the subject ordinance in regulating the

place, and manner of protected speech was founded on the concept of the furtherance of significant governmental interests.

Morris, supra, specifically held that the regulation of a First Amendment interest, in the context of a nude theatrical presentation, at a location where there is no alcoholic beverages served, is presumed to be unconstitutional.

The lower court, and the court of appeal, resorted to a presumption of constitutionality of the regulatory ordinance per se, simply on the face of the subject ordinance; said resolution is erroneous.

II

The Proper Regulation Of First Amendment Interests In Terms Of Time, Place, and Manner, Requires A Showing Of Furtherance Of Significant Governmental Interest

In the instant case there has been no showing whatsoever to support the proposition of substantial governmental interest in regulation of First Amendment safeguards involved.

It should be noted that regulation of protected speech will be upheld if necessary to further significant governmental interests. Ellwest Stereo Theaters, Inc. v. Wenner, 681 F. 1243, 1245 (9th Cir. 1982).

In BSA, Inc., supra, the court specifically addressed the question of "significant governmental

interests" in terms of the affidavits of two law enforcement officers which allegedly satisfied the foundational requirements. In the instant case there is a total void to support the proposition of "significant governmental interests".

As a matter of fact the only foundation to support the proposition of "significant governmental interests" is the bare existence of the subject ordinance. Said support is totally inadequate at best.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Review by this Court is necessary on the grounds that the decision of the Court of Appeals and affirmation by way of denial of review of same by the Supreme Court of the State of California is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision. There are important questions of law which are in issue herein requiring settlement by the court below and the Court of Appeals' decision exceeded the limits of jurisdiction afforded by ruling diametrically in opposition to the decision of the Supreme Court of the

State of California.

DATED: 11/12/90

Respectfully submitted,

SEBASTIAN D'AMICO
Attorney for Petitioner,
PAUL A. RICHTER, an
individual, dba
"THE BODY SHOP"

APPENDIX "A"

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One, No. D009709
S016414

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PAUL A. RICHTER, Appellant

v.

CITY OF SAN DIEGO Et Al., Respondents

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

[Supreme Court filed August 15, 1990]

/s/ PANELLA
Chief Justice

APPENDIX "B"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL A. RICHTER,	)	
	)	
Plaintiff and Appellant,	)	D009709
	)	
v.	)	(Super. Ct. No. 604265)
	)	
CITY OF SAN DIEGO, et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgment of the Superior Court of San Diego County, James R. Milliken, Judge. Affirmed.

Plaintiff Paul A. Richter, doing business as The Body Shop, appeals a summary judgment favoring defendants, City of San Diego and Robert Burgreen, Chief of Police of the City of San Diego (together San Diego) on

his claim San Diego's nude entertainment ordinance (San Diego Mun. Code,[1/] Div. 36, §§ 33.3601 et seq.) is unconstitutional, did not apply to his business and had been selectively enforced against his business. On appeal, Richter contends the superior court erred in granting San Diego's motion for summary judgment because the court improperly presumed the constitutionality of the ordinances, erroneously concluded they were constitutional and erred in finding there were no triable issues of fact, including whether the ordinances had been selectively applied to him. We affirm.

1/ All statutory references are to the San Diego Municipal Code unless otherwise specified.

FACTUAL AND PROCEDURAL HISTORY

The Body Shop is a theater in San Diego which offers nude dancing as live entertainment. It does not sell alcoholic beverages. Between August 1987 and March 1988 San Diego's vice detectives observed at The Body Shop near-continuous violation of an ordiance requiring nude entertainers to remain six feet away from patrons. In April 1988, San Diego suspended Richter's theater permit for 30 days. After exhausting his administrative remedies, Richter filed suit against San Diego, asking the superior court to declare the ordinance inapplicable to his business, unconstitutional as applied to him and to restrain enforcement of the 30-day permit suspension. The court granted Richter a preliminary injunction

against enforcement of the suspension. On November 30, 1988, San Diego successfully moved for summary judgment.

DISCUSSION

I

Interpretation of the Ordinance

Division 36 of the San Diego Municipal Code regulates nude entertainment businesses in the City of San Diego. The City has declared:

> "[T]he purpose and intent of [Division 36 is] to provide for the orderly regulation of the business of nude entertainment and nude entertainers in the City of San Diego by establishing certain minimum standards for the conduct of this type of business to protect the public order and the general welfare of the residents

of the City of San Diego." (§ 33.3602.)

"Nude entertainment" is defined as "any activity where a nude person provides services, including, but not limited to, talking, reading, listening, singing, posing, walking, dancing, or wrestling." (§ 33.3604, subd. (c).) A "nude entertainment business" is defined as "any establishment or business where any individual, firm, association, partnership, corporation, or combination of individuals engages in, conducts, carries on or permits to be engaged in, conducted, or carried on 'nude entertainment,' . . . . It includes an adult cabaret, and bars and other establishments commonly known as 'topless.'" (§ 33.3604, subd. (b).) The ordinance

requires a nude entertainment business to obtain a license and comply with certain regulations. (§§ 33.3605, 33.3610.) The regulations imposed on nude entertainment businesses are contained in section 33.3610:

> "No person, association, partnership, or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of nude entertainment business unless each and all of the following requirements are met:
>
> "(a) Each person employed or acting as a nude entertainer shall have a valid permit issued pursuant to the provisions of this Division, and it shall be unlawful for any owner, operator,

responsible managing employee, manager or permittee in charge of or in control of a nude business to employ or permit any person to act as a nude entertainer who is not in possession of a valid, unrevoked Nude Entertainer Permit, which permit shall be prominently displayed with the permit required of the business.

"(b) The possession of a valid Nude Entertainment Business License does not authorize the possessor to perform services for which a Nude Entertainer Permit is required.

"(c) It shall be unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of a nude entertainment business to allow any person below the age of

eighteen (18) years upon the premises or within the confines of any nude entertainment business.

"(d) Nude entertainment services shall be conducted or carried on only between the hours of 6 a.m. and 2 a.m. of the following day.

"(e) No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises. . . .

"(f) No responsible person, as defined in this Article, shall permit or allow at licensed premises any patron to approach within six feet of a nude entertainer, or permit or allow a nude entertainer to approach within six (6) feet of a patron...

"(g) All employees of nude entertainment businesses, other

than nude entertainers while performing, shall, at a minimum while on or about licensed premises, wear an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region, and the breasts of a female including the areola thereof. Regulatory only with this Article." (Emphasis added.)

Exemptions are contained in section 33.3615 which provides in pertinent part:

"Except as to the provisions of Section 33.3610 (e), (f), and (g), the provisions of this Division shall not apply to the following:

"(a) Any theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. . . ."

Richter claims the "six-foot rule" of section 33.3610, subdivisions (e) and (f) are not applicable to The Body Shop because the rule, by its terms, applies only to "licensed premises," i.e., licensed nude entertainment businesses, and his business is not such a licensed premise; The Body Shop is a theater operating under a theater permit.

The fundamental goal of statutory construction is to ascertain the legislators' intent so as to effectuate the purpose of the law. (T.M. Cobb Co. v. Superior Court (1984) 36 Cal.3d 273, 277.) In determining such intent, the court first looks to the words of the statute, attempting to give effect to the usual, ordinary import of the language and to avoid making any

language mere surplusage. (See Regents of University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601, 607; Fontana Unified School Dist. v. Burman (1988) 45 Cal.3d 208, 219.) The words must be construed in context in light of the nature and obvious purpose of the ordinance where they appear. (See Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658-659.) The various parts of an ordinance must be harmonized in context of the statutory framework as a whole. (See Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230-231; Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal.3d 736, 746.) Finally, the ordinance "must be given a reasonable and

commonsense interpretation consistent with the apparent purpose and intention of the [City], practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. (Citations.]" (Beaty v. Imperial Irrigation Dist. (1986) 186 Cal.App.3d 897, 902; see also Webster v. Superior Court (1988) 46 Cal.3d 338, 344.)

Here, the stated purpose of the ordinance is to regulate nude entertainment in the City. The ordinance seeks to reach this goal by requiring nude entertainment businesses to obtain licenses, nude entertainers to obtain permits and for both to comply with various regulations. The regulations imposed on nude entertainment business are

in addition to the licensing and permit requirements; the ordinance specifically states "No person, association, partnership, or corporation shall engage in. . . the operation of nude entertainment business unless each and all" of its regulations are met. (§ 33.3610, emphasis added.)

As Richter points out some of the regulations contained in section 33.3610 refer to "licensed premises." The six-foot rule contained in subdivision (e) of section 33.3610 provides "No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises." (Emphasis added.) This language must be viewed in context of the language used in section 33.3615, the section labeled

"Exemptions." Section 33.3615 states that Division "shall not apply" to a theater "[e]xcept as to the provisions of Section 33.3610 (e), (f), and (g)," that is the six-foot and non-entertainer clothing rules. Section 33.3615 exempts theaters from the licensing requirements of the ordinance and thus theaters would not be a "licensed premise" as defined by the ordinance. 2/ Under Richter's interpretation, since a theater is technically not a "licensed premise," then the six-foot rule of section 33.3610, subdivisions (e) and (f) do

---

2/ The ordinance provides: "Whenever used in this Division, . . . [¶] 'License' shall mean the business license to operate a nude entertainment business required by this division." (§ 33.3604, subd. (e).)

not apply to a theater. This interpretation, however, would render section 33.3615 mere surplusage; it would give no effect to the City's clear intent to require a theater, exempted from licensing and other regulations of the ordinance, to comply with the six-foot and non-entertainer clothing rules. Richter's interpretation would also nullify section 33.3610's clear intent to prohibit all businesses from offering nude entertainment "unless each and all" of the section's regulations are met.

In order to effectuate the legislative intent of the ordinance, section 33.3610 must be interpreted as applying to the six-foot and non-entertainer clothing rules to all nude entertainment notwithstanding

the section' sue of the phrase "licensed premises." This phrase, when read in context of the ordinance as a whole, was inadvertent and not intended to restrict the six-foot rule to businesses which have a nude entertainment license. The overall statutory framework makes it clear that the six-foot rule is intended to also apply to theaters as indicated by the fact that the only section in the ordinance which specifically addresses theaters, theaters are specifically not exempted from the six-foot rule. Since Richter's business is a theater which provides nude entertainment, he was required to comply with the six-foot rule.

II

Selective Law Enforcement

Richter contends summary judgment is improper because there are triable issues of fact as to whether the ordinance was selectively enforced against The Body Shop.

Summary judgment is improper if there are triable issues of material fact. (See Lichty v. Sickels (1983) 149 Cal.App.3d 696, 699.) On summary judgment, the moving party bears the burden of furnishing supporting documents to establish the opposing party's claims are entirely without merit on any legal theory. (Lipson v. Superior Court (1982) 31 Cal.3d 362, 364.) In opposing summary judgment, the plaintiff may not rely on the verified pleadings alone but must file an affidavit in opposition

to the motion. (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 293, p. 591.) A bare conclusion of law is insufficient to create a triable issue of fact even when the conclusion is not uncontradicted. (Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal.App.3d 1130, 1137.) "The affidavits must cite evidentiary facts, not legal conclusions or 'ultimate' facts. [Citation.]" (Hayman v. Block (1986) 176 Cal.App.3d 629, 639.)

To prevail on a claim of selective prosecution, an individual must show (1) he was deliberately singled out for prosecution based upon an invidious or unjustifiable standard and (2) he would not have been

singled out except for the discriminatory design of the prosecutor. (People v. Superior Court (Hartway) (1977) 19 Cal.3d 338, 348,; Murgia v. Municipal Court (1975) 15 Cal.3d 286, 293.) Because "[i]t is presumed that official duty has been regularly performed," a person claiming selective enforcement has the burden of proving at trial that he has been the victim of discriminatory prosecution. (Evid. Code, § 664; People v. Smith (1984) 155 Cal.App.3d 1103, 1128-1131, cert. den. 469 U.S. 1160.) A prosecution which results from an intent to punish a defendant for belonging to a class or exercising rights protected by the equal protection clause cannot be sustained. (People v. Smith, supra, 155 Cal.App.3d 1103, 1133.)

Here, Richter submitted a declaration stating San Diego had "attempted to selectively enforce such ordinances under Division 36 against myself and my business" and that "[t]he selective enforcement by Defendants of said ordinances has created confusion and guess work as to my rights and obligations." San Diego did not submit any affidavits contradicting this declaration, i.e., declaring that it had fairly enforced the ordinance. At the hearing on the summary judgment motion, San Diego urged the court to take judicial notice of the court's records, explaining:

"There's only two of these places, this one and one next-door. And they just lost on the exact same thing two weeks ago. We took the

exact same enforcement action against both of them. They both did the same response. This is the second motion for summary judmgnet. When you've got a hundred percent enforcement, you can't disclaim equal protection."

The trial judge, who was apparently also involved in the other case, said "Okay." Richter's attorney responded: "I thank counsel for his point in bringing to the court's attention that there's only two places in the County of San Diego that apply. Okay. That would be one -- under the exceptions, that would be one of the arguments in terms of selective law enforcement." He also asserted he had "a series ... of potential deponents in this particular case."

The court here, in granting summary judgment, stated:

"The Court relies on establish case law which says that 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconsitutionality clearly, positively and unmistakably appears.' [In re Dennis M., 70 Cal.2d 444, Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, In re Benson, 172 C.A.3d 532] Notwithstanding, a dirth of evidence from the City as to the actual legislative purpose for the statute, the Court believes on these facts, with no infringement

on first amendment rights to expression, that the presumption of validity of the statute in light of the circumstances should be applied.

"The plaintiff has had several opportunities to offer evidence of unconstitutionality based on the other grounds asserted in the complaint. There is no evidence before us, for example, of selective enforcement of the statute."

It might appear the court, in granting summary judgment, erroneously relied on the presumption and placed the burden of proof on Richter. However, the record shows San Diego asking the court to take judicial notice of its own files as to another case involving enforcement

of the same ordinance. San Diego represented this was the only other business similar to The Body Shop and that the ordinance had been applied also to this other business. The court apparently took judicial notice of this other case and Richter essentially conceded there was only one business similar to his in San Diego and that this other business was the subject of another enforcement action. At the hearing, Richter did not contest these facts nor bring other facts to the court's attention to support his claim the ordinance had been selectively enforced; rather he made a vague reference of the existence of "potential deponents" without stating who they might be or what they might testify to. Richter's declaration

filed in opposition to the summary judgment motion contained only conclusonary allegations to support his claim of selective enforcement. Under these circumstances, San Diego was entitled to summary judmgnet. (See 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 288, p. 587.) San Diego offered facts, through the court taking judicial notice of its own files, indicating the ordinance had been fairly enforced. Richter failed to offer any facts to contest this evidence and only the most conclusory facts to support his claim of selective enforcement. There were no triable issues of fact on this question and summary judgment was properly granted on the claim of selective enforcement and the due

process and equal protection claims which were premised on the claim of selective enforcement.

III

Overbreadth

Richter contends the ordinances are overbroad.

In Morris v. Municipal Court (1982) 32 Cal.3d 553, 564, the California Supreme Court stated:

> "(1) A ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech. Nonobscene nude dancing cannot be barred without, in some cases, infringing upon constitutionally protect expression. [Fn. omitted.] (2) An enactment prohibiting nonobscene nude dancing which extends beyond

establishments serving alcohol is presumptively overboard. [Fn. omitted.]"

Since The Body Shop does not serve alcoholic beverages, an ordinance banning nude dancing at The Body Shop would be presumptively overbroad. However, Division 36 does not prohibit nude dancing at The Body Shop or similar establishments On the contrary, Division 36 specifically permits nude entertainment and delineates a licensing and regulation system for nude-entertainment businesses in the City of San Diego.

The constitution does not ban all regulation affecting First Amendment interests. "Regulations of the time, place, or manner of protected speech will be upheld if necessary to

further significant governmental interests. [Citation.]" (BSA, Inc. v. King County (9th Cir. 1986) 804 F.2d 1104, 1111.) In the BSA case, the Ninth Circuit considered the validity of two local ordinances which required all nude entertainment to be perform on a stage eighteen inches high and six feet from the nearest patron. The Court upheld the validity of the ordinances, stating:

> "We note at the outset that BSA and Chase have failed to explain how the distance requirement impinges upon their First Amendment rights. The requirement does not prohibit nude entertainment. It also does not diminish the expressiveness of nude entertainment. There is no allegation that the distance

between entertainer and patron is an integral part of the expressive activity, or that 'the viewing public is [less able] to satisfy its appetite for sexually explicit fare.' [Citation.]

"Even assuming, however, that the distance requirement does burden protected expression, it is a valid place or manner regulation. Regulations of the time, place, or manner of protected speech will be upheld if necessary to further significant governmental interests. [Citation.] Curtailing public sexual contact and sexual criminal offenses represents a significant state interest. [Citation.] The six-foot/eighteen inch distance requirement furthers this interest

by keeping nude entertainers just out of reach of the nearest patron." (Id. at p. 1111.)

We find this reasoning persuasive. Accordingly, we conclude the six-foot rule here is a reasonable place or manner restriction.

DISPOSITION

The summary judgment is affirmed.

/s/ KREMER
P.J.

WE CONCUR:

/s/ FROEHLICH
J.

/s/ NARES
J.

APPENDIX "C"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

PAUL A. RICHTER, an individual dba "THE BODY SHOP",	)	No. 604265
Plaintiff,	)	
vs.	)	MEMORANDUM DECISION
THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, et al.,	)	
Defendant.	)	

The City's motion for Summary Judgment came before the Court on January 27, 1989. Sebastian D'Amico represented the plaintiff and Grant Telfer represented the City.

Plaintiff challenges the constitutionality of Municipal Code Chapter III, Article 3, Division 36, specifically, sections 33.3610(e), (f) and (g) on the grounds of vagueness, cruel and unusual

punishment, and equal protection. This municipal ordinance requires that nude dancers stay six feet away from the patrons. Plaintiff asserts that this ordinance does not apply to his establishment, "The Body Shop", since it is licensed as a "theater" and not for nude entertainment.

Although the municipal ordinance in question is grammatically unfortunate, it is not unconstitutionally vague. A clear reading of this statute necessitates the conclusion that the six foot restriction does apply to plaintiff's establishment.

The Court relies on established case law which says that "All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient

reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconsitutionality clearly, positively and unmistakably appears." [In re Dennis M., 70 Cal.2d 444, Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, In re Benson, 172 C.A.3d 532] Notwithstanding, a dirth of evidence from the City as to the actual legislative purpose of the statute, the Court believes on these facts, with no infringement on first amendment rights to expression, that the presumption of validity of the statute in light of the circumstances should be applied.

The plaintiff has had several opportunities to offer evidence of unconstitutionality based on the other grounds asserted in the

complaint. There is no evidence before us, for example, of selective enforcement of the statute.

The Court grants the City's motion for summary judmgnet.

DATED: February 22, 1989.

/s/ JAMES R. MILLIKEN

Supreme Court, U.S.
FILED
FEB 19 1991
OFFICE OF THE CLERK

(2)

No. 90-818

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL A. RICHTER, an individual dba "THE BODY SHOP",

Petitioner,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

JOHN W. WITT, City Attorney
EUGENE P. GORDON, Chief Deputy
*GRANT RICHARD TELFER, Deputy

Office of the City Attorney
Litigation Division
525 B Street, Suite 2100
San Diego, California 92101
Tel. (619) 533-4700

**Counsel of Record for Respondents*

BEST AVAILABLE COPY

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

This case comes before the Court on a petition by Paul Richter, dba "The Body Shop", plaintiff-appellant below, for a Writ of Certiorari. At issue is a

judgment of the Court of Appeal for the State of California, Fourth Appellate District, Division One which upheld the Superior Court's ruling on summary judgment granted the respondents.

STATUTE/MUNICIPAL CODE INVOLVED

Petitioner correctly stated that this case involves San Diego Municipal Code, Chapter III, Article 3, Division 36, section 33.3610. In addition, this case necessarily involves sections 33.3602 and 33.3615, contained in the same Chapter, Article and Division:

§ 33.3602 Purpose and Intent

> It is the purpose and intent of this division to provide for the orderly regulation of the business of nude entertainment and nude entertainers in the City of San Diego by establishing certain minimum standards for the conduct of this type of business to protect the public order and the general welfare of the residents of the City of San

Diego.

§ 33.3615 Exemptions

Except as to the provisions of Section 33.3610(e), (f) and (g), the provisions of this Division shall not apply to the following:

(a) Any theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. Any establishment claiming exemption from regulation pursuant to this subsection shall be subject to licensing and regulation pursuant to Divisions 15 or 16 of this Article, as appropriate, pending administrative or legal determination as to its exempt status under this Division.

(b) Any studio which is operated by any state college or university or public community college or school wherein the persons, firm, association, partnership, or corporation operating it have met the requirements established in Division 21 of the California Education Code for the issuance or conferring of, and is in fact authorized thereunder to issue and confer, a diploma or honorary diploma.

(c) Any premises where there is conducted the business of furnishing, providing or procuring figure models solely for any studio

described in subdivision (b) of this section.

STATEMENT OF THE CASE

In the interest of brevity, respondents accept the petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should not be granted because the First Amendment questions here were not raised in the court below, wherein Petitioner/Plaintiff challenged the constitutionality of the Municipal Code section on the grounds of vagueness, cruel and unusual punishment, and equal protection. In addition, the issue presented was properly decided below on settled law, and is not of sufficient importance for review by this Court.

ARGUMENTS

I

THE QUESTIONS PRESENTED BY PETITIONER WERE NOT RAISED OR PRESERVED BELOW

Petitioner raises two questions in his petition which, essentially, argue that there was an unmet burden of proof on respondent in regulating petitioner, insofar as petitioner's activity involved the First Amendment. Petitioner did not raise a First Amendment issue in the trial court. As can be seen by the Memorandum Decision of the trial court (Petn, Appen. C, pp. C1-C2), petitioner challenged the constitutionality of the San Diego Municipal Code sections at issue on the rounds of vagueness, cruel and unusual punishment and equal protection. On appeal, petitioner stated that:

The substance of Plaintiff's complaint is that:

A. Division 36 of the SDMC (containing the alleged sections violated) does not apply to him and his business ON THE FACE OF THE ORDINANCE.

B. Alternatively, any attempt to apply the subject SDMC sections (i.e., §§ 33.3610(e), (f) and (g) to Plaintiff would be predicated on a reading of the ordinance that, at best, would be patently ambiguous, and therefore unconstitutional.

C. The subject ordinances are unconstitutional in that they are violative of the fundamental right of due process and equal protection, and in particular they have been selectively applied to Plaintiff (i.e., by their enactment and application).

(Appen. A, pp. A-9-A-10.)

The questions presented to this Court have, therefore, not been presented by petitioner in the decisions rendered

against petitioner. The case is thus inappropriate for review by the United States Supreme Court. See, Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 196-197 (1965); Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).

II

THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY

Petitioner argues that this case is appropriate for review because the lower court recognized a presumption of constitutionality of the San Diego Municipal Code in the face of petitioner's assertion of First Amendment issues. The lower court did, in its opinion, examine the First Amendment issue. The court found that petitioner's citation of Morris v.

Municipal Court, 32 Cal.3d 553 (1982), which holds that a ban on nude dancing is impermissible, is not applicable to this case because San Diego permits nude dancing. The court instead applied BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986), a case virtually on point, which holds that a requirement for nude dancers to maintain a six-foot distance from patrons is constitutionally permissible. Since petitioner has not asserted that his case is factually different from BSA, Inc., or that BSA, Inc. was improperly decided, there is no basis for further review.

III

THE ISSUE RAISED BY PETITIONER IS NOT IMPORTANT AND AN INCORPORATING ISSUE IS BEING CONSIDERED BY THE COURT IN ANOTHER CASE

At issue in this case is the validity of a municipal ordinance requiring nude entertainers to remain six feet distant from patrons. This precise issue was clearly decided by BSA, Inc. v. King County, supra, 804 F.2d 1104. BSA, Inc. has remained undisturbed and unchallenged, and has been cited with approval by other circuit-level decisions for its recognition of the First Amendment implications of nude dancing. See, e.g., Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990). Miller is presently being reviewed by this Court on the overlying issue of municipal prohibition

of nude dancing. Barnes v. Glen Theatre, Inc. (No. 90-26). Accordingly, review of a six-foot distance rule within a permissive scheme is lacking in import for review by this Court at this time.

CONCLUSION

The case began at the trial level as a challenge based, in essence, on vagueness in application and equal protection. At the appellate level it was treated as such, but with a brief reference to an overbreadth issue not raised initially by petitioner. In that reference, the California Court of Appeal, Fourth District, briefly distinguished petitioner's case and recognized the settled law.

The petition is in this Court for review on questions not raised or

properly reviewed below. Additionally, the ultimate issue of the six-foot rule has long been settled in law, and is not of sufficient import for review by this Court. For these various reasons, the Petition for Writ of Certiorari should not be granted.

DATED: February 18, 1991

Respectfully submitted,

JOHN W. WITT, City Attorney

By

Grant Richard Telfer
Deputy City Attorney

Attorneys for Defendant
City of San Diego

APPENDIX A

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION ONE

PAUL A. RICHTER, an individual, dba "THE BODY SHOP",	)
Plaintiff-Appellant,	)
v.	)
THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego; and DOES 1 through 50, inclusive,	)
Defendants-Respondents.	)

Court of Appeal No D009709
Superior Court No. 604265

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of the State of California, in and for the County of San Diego, Honorable James R. Milliken, Judge

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SEBASTIAN D'AMICO
Attorney at Law
2645 First Avenue
San Diego, CA 92103-6505
Telephone: (619) 232-5881
Attorney for Plaintiff-
Appellant PAUL A. RICHTER

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PAUL A. RICHTER, an individual, dba "THE BODY SHOP",

Plaintiff-Appellate,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego; and DOES 1 through 50, inclusive,

Defendants-Respondents.

Case No. D009709
Superior Court No. 604265

Appeal from the Superior Court of San Diego County Honorable James R. Milliken, Judge

APPELLANT'S OPENING BRIEF

I

INTRODUCTION

Plaintiff appeals the court's granting of Defendants' Motion for Summary Judgment on March 3, 1989, and the finding that there is no triable issues of any material fact, and that Defendants' are entitled to judgment as a matter of law. (C.T. 188, 189).
[-1-]

II

STATEMENT OF THE CASE

Plaintiff operates a business offering theatrical demonstrations or exhibitions, amusements, and viewing by knowingly consensual audience desirous of viewing same in the assertion of his/her/their First Amendment rights (C.T. 2,3). Said business is located in the City of San Diego, County of San Diego, State of California. The conduct of Plaintiff's business is authorized as a theatre under the San Diego Municipal

Code ("SDMC") and a permit has been duly issued (C.T. 17).

Defendant CITY did allegedly enact, adopt, and amend various sections of certain ordinances under the SDMC. More specifically, the sections of certain ordinances which are the subject of Plaintiff's complaint are designated under Division 36, §§ 33.3601 through and including 33.3620 (C.T. 102-106). The Plaintiff did not seek an exemption from regulation under Division 36 because Plaintiff does not hold a license pursuant to Division 36. Defendant CITY notified Plaintiff of its intention to sanction Plaintiff by way of suspension of his theatre permit due to alleged violations of SDMC §§ 33.3610(e), (f) and (g) (C.T. 17-18). Regulatory action was initiated to

suspend Plaintiff's theatre permit for thirty (30) days. This action led to an administrative hearing at which time the factual violations were stipulated and the matter was submitted on the legal issues. the hearing officer decided to uphold the action of Defendant. However he refused to rule on the constitutionality of the subject ordinances (C.T. 73).

After the San Diego City Council denied Plaintiff's appeal

[-2-]

the San Diego Police Department issued a letter to Plaintiff on September 22, 1988, advising him that a thirty-day suspension would commence on October 1, 1988, thus putting Plaintiff out of business for said period (C.T. 19).

Plaintiff filed his complaint for Declaratory Relief and Injunctive Relief

(To determine validity of ordinance) on September 30, 1988 (C.T. 1), and obtained a Temporary Restraining Order against the imposition of the subject suspension along with obtaining a Preliminary Injunction against imposing same, issued November 20, 1988 (C.T. 75-76).

Defendants filed their Motion for Summary Judgment on November 30, 1988 (C.T. 78). Said Motion was heard on January 27, 1989. The Honorable James R. Milliken rendered his "Memorandum Decision" on the defendants' Motion on February 22, 1989 (C.T. 161-162), and Order for Entry and granting of same on March 3, 1989 (C.T. 188-189).

Defendant filed his Notice of Appeal on March 8, 1989 (C.T. 191).

The substance of Plaintiff's complaint

is that:

A. Division 36 of the SDMC (containing the alleged sections violated) does not apply to him and his business ON THE FACE OF THE ORDINANCE.

B. Alternatively, any attempt to apply the subject SDMC sections (i.e., §§ 33.3610(e), (f) and (g)) to Plaintiff would be predicated on a reading of the ordinance that, at best, would be patently ambiguous, and therefore unconstitutional.

C. The subject ordinances are unconstitutional in that they are violative of the fundamental right of due process and equal protection, and in particular they have been selectively

applied to Plaintiff (i.e., by their enactment and application).

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III

RELIEF SOUGHT

Plaintiff seeks the relief of this Court by way of reversing the granting of Defendant's Motion for Summary Judgment and remanding the case for trial based on the lower court's error(s) including:

A. The granting of Defendants' Motion for Summary Judgment where there were triable issues of fact including but not limited to the question of "selective" application of the subject ordinances to Plaintiff.

B. The granting of Defendant's Motion for Summary Judgment in finding that the subject

ordinances apply to Plaintiff.

C. The granting of Defendants' Motion for Summary Judgment and relying on the presumption of constitutionality of the subject ordinance for the particular business of Plaintiff.

D. The determination that the subject ordinances although "GRAMMATICALLY UNFORTUNATE" are/is still constitutional.

E. The finding that notwithstanding a "dirth" [sic] of evidence from the Defendants relative to valid legislature purpose the subject ordinances was/were still constitutional.

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IV

ARGUMENT

A. There Are Triable Issues of Fact

Alleged By Plaintiff In His Verified Complaint.

In his verified complaint (C.T. 1-21) Plaintiff avers that the subject ordinances are violative of the fundamental right of due proces and equal protection in that they have been that to Plaintiff. The Court will see that the record on appeal is totally void of any declarations or other evidence to rebut the verified averment.

Further, the application of the ordinance to Plaintiff in a selective fashion is a factual question - not one of law. On this basis alone the Superior Court erred in granting Defendants' Motion for Summary Judgment.

It is proper for a Court to grant a motion for summary judgment only if the supporting papers are sufficient to

sustain a judgment as a matter of law in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue as to any material fact. Cal. Code of Civil Procedure ("CCP") §437c. Plaintiff has raised triable issues of fact which the Defendants have failed to rebut in their motion.

Summary judgment is a drastic procedure and should be used with caution so that it does not become a substitute for the open trial method of determining facts. Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 851-852, 94 Cal.Rptr. 785, 484 P.2d 952 (1971). It must be clear from the declarations and affidavits that there is/are no triable issue(s) of fact. Summary judgment deprives the

losing party

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of a trial on the merits and may not be invoked unless it is clear. Bunzel v. American Academy of Orthopaedic Surgeons, 107 Cal.App.3d 165, 165 Cal.Rprt. 433 (1980).

Summary Judgment is only proper if the supporting affidavits are sufficient to sustain a judgment for the moving party and the opposing affidavit does not show facts sufficient to present a triable issue of fact. The moving party's affidavits are strictly construed and the opponent's liberally construed, and doubts as to the propriety of summary judgment are resolved against granting the motion. Jos. Schlitz Brewing Co. v. Downey Distributor, 109 Cal.App.3d 908, 914, 916, 167 Cal.Rptr. 12, (1967).

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B. The Subject Ordinance Does Not

Apply to Plaintiff.

By following the steps as indicated below one can readily determine that the ordinance (i.e., SDMC §§ 33.3610(e), (f) and (g) doe not apply to Plaintiff.

1. Examine Division 36 of the SDMC (C.T. 102-106).
2. SDMC § 33.3604 defines "licenses" as the license required by this division (C.T. 102).
3. SDMC § 33.3615 states the provision of this Division (i.e., 36) do not apply to a theatre except for SDMC §§ 33.3610(e), (f) and (g) (C.T. 106).
4. Plaintiff maintains a theatre permit for the subject business and is not licensed under Division 36.
5. SDMC §§ 33.3610 (f) and (g)

allegedly prohibit certain types of activity on licensed premises! (C.T. 105).

6. The alleged activity is the very type for which Defendants were attempting to shut Plaintiff down for THIRTY (30) days.

In summary, by the very ordinance, the prohibition provisions of SDMC §§ 33.3610(e), (f) and (g) specifically state they apply to licensed premises, and by a reasonable reading defines that term under SDMC § 33.3604. However, Plaintiff is licensed by a Division of the SDMC other than Division 36.

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C. In A Constitutional Challenge Of The Type Before The Court The Presumption Against Unconstitutionality Does Not Apply.

In the Supreme Court case of Morris v.

Municipal court for The San Jose - Milpitas Judicial District of Santa Clara County (1982) 32 Cal.3d 553 substantially identical issues were raised as in the instant cause, including the summary judgment hearing. The holding in Morris is clearly that an enactment (e.g. ordinance) prohibiting non-obscene nude dancing which extends beyond establishments serving liquor is presumptively overbroad. Plaintiff DOES NOT SERVE LIQUOR. Therefore, the subject ordinance is presumptively overbroad on its face. Further, Defendants have not overcome that presumption in any manner.

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D. The Defendant Is Compelled To Submit and Prove Compelling State Interest To Uphold A Constitutional Challenge To The Type Of Ordinance

Involved.

In his Memorandum Decision (C.T. 162, lines 12-13) Judge Milliken states ". . . Notwithstanding a dirth [sic] of evidence from the City as to actual legislative purpose of the statute, . . .".

That basis for deciding the Defendants' Motion for Summary Judgment is replete with error, at the minimum, when compared to the clear and unequivocal language contained in Morris, supra.

Morris contains a superb summary of the law relative to the statutes and ordinances aimed at limiting theatrical nude entertainment. Further, the distinction is patently drawn between such statutes and ordinances whose purpose is to control theatrical nude

entertainment in settings where alcoholic beverages are served verses [sic.] those in which none are served.

In that latter type setting Morris holds that to overcome a constitutional challenge there must be a showing that it (the ordinance) is "narrowly drawn" and furthers "a sufficiently substantial government interest."

Simply stated, the record in the instant case is totally void of any showing of furthering "a sufficiently substantial government interest" and that it (the ordinance) was "narrowly drawn".

[-10-]

E. The Moving party Bears The Burden To Establish That The Claims Of The Opposing Party Are Entirely Without Merit On Any Legal Theory.

The moving party bears the burden of

furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory. Lipson v. Superior Court, 31 Cal.3d 362, 374, 182 Cal.Rptr. 629, 644 P.2d 822 (1982). The Defendants presented broad legal theories in support of a motion for summary judgment. However, the Defendants have not brought forth any proof through declarations or affidavits that the claims of the Plaintiff are entirely without merit on any legal theory. The Defendants must show, among other items, that the Plaintiff has not right to have a judge determine if an ordinance is being unconstitutionally applied to him.

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F. Plaintiff Has Raised Triable Issues of Fact Re The Constitutionality Of The Subject Ordinance; The Triable

Issues Should Not Be Decided By Summary Judgment.

The Plaintiff has a triable issue of fact that should not be decided through summary judgment. SDMC § 33.3604(e) ("Definitions"), states that "LICENSE" shall mean the business license to operate a nude entertainment business required by this division. The Plaintiff's establishment is considered a theatre and duly licensed as one, and not under Division 36. The requirements of SDMC §§ 33.3610(e), (f) and (g) regulate the distance between a performer and the patrons "while on licensed premises" (i.e., licensed under Division 36). The only logical interpretation of licensed premises is a licensed nude entertainment business which is regulated under Division 36 of

the SDMC.

For arguendo even if this Court finds the ordinance to be constitutional, the Plaintiff can show through evidence at trial that the Defendant CITY has selectively enforced these ordinances and by applying them to the Plaintiff, has violated his constitutional rights under the equal protection, and due process clauses.

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G. Action For Declaratory Relief As An Appropriate Remedy.

Declaratory relief is authorized by CCP § 1060 and the action is governed by CCP §§ 1060-1062a. These provisions are found in Part Two of the CCP entitled "Civil Actions" and, hence, a declaratory relief action under CCP § 1060 is a civil action (see also CCP § 30, defining civil action, among other

things, as an action prosecuted by one party against another for the declaration of a right); Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719, 733, 146 P.2d 673. Being a civil action, it is subject to the other applicable provisions of Part Two of the CCP, that is, to the applicable provisions in CCP §§ 307-1059.

The purpose of declaratory relief is to liquidate uncertainties and controversies which may result in future litigation (Fagerstedt v. Continental Ins. Co. (1968) 266 Cal.App.2d 370, 372 72 Cal.Rptr. 126) and, hence, to quiet or stabilize an uncertain or disputed jural relation (Tiburon v. Northwestern Pac. R.R. Co. (19970) 4 Cal.App.3d 160,173, 84 Cal.Rptr. 469) by permitting a prompt adjudication of the respective

rights and obligations of the parties (Lortz v. Connell (1969) 273 Cal.App.2d 286, 301 Cal.Rptr. 6). It enables the parties to shape their future conduct so as to avoid the breach of an obligation (see Babb v. Superior Court (1971) 3 Cal.3d 841, 848, 92 Cal.Rptr. 179, 470 P.2d 379; Watson v. Sansone (1971) 19 Cal.App.3d 1, 3, 96 Cal.Rptr. 387).

Declaratory relief actions are also proper under CCP § 1060 to secure an interpretation of city charter provisions (see, e.g., LePage v. Oakland (1970) 13 Cal.App.3d 689, 692-693, 91 [-13-] Cal. Rptr. 806), statutes, and ordinances (See, e.g., Walker v. Los Angeles County (1961) 55 Cal.2d 626, 637, 12 Cal.Rptr. 671, 361 P.2d 247; Christmat, Inc. v. Los Angeles County (1971) 15 Cal.App.3d 590, 594, 93

Cal.Rptr. 324), and to test the constitutionality of initiative measures (see, e.g., Weaver v. Jordan (1966) 64 Cal.2d 235, 240, 49 Cal.Rptr. 537, 411 P.2d 289), statutes (see, e.g., Nevada County v. Macmillen (1974) 11 Cal.3d 662, 666, 114 Cal.Rptr. 345, 522 P.2d 1345), and constitutionality of ordinances (see, e.g., California v. Superior Court (1974) 12 Cal.3d 237, 251, 115 Cal.Rptr. 497, 524 P.2d 1281; Subriar v. Bakersfield (1976) 59 Cal.App.3d 175, 194-195, 130 Cal.Rptr. 853).

Because declaratory relief actions deal with present rights to have immediate judicial assurance that advantages will be enjoyed or liability escaped in the future, where only past wrongs are involved there is no basis

for declaratory relief (Baldwin v. Marina City Properties, Inc. (1978) 79 Cal.App.3d 393, 405, 145 Cal.Rptr. 406). But if there is a reasonable expectation that the past wrong or wrongs will be repeated in the future, the controversy does not present mere academic questions resulting from mootness or other considerations and declaratory relief should not be denied (Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal.App.3d 372, 381 96 Cal.Rptr. 825; see also Mascarin Professional Pharmacy v. Hart (1970) 13 Cal.App.3d 462, 465, 91 Cal.Rptr. 560).

Because CCP § 1060 contains no suggestion that the Plaintiff must allege facts entitled him or her to a favorable decision (Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719,

730,

[-14-]

146 P.2d 673), if the complaint meets the foregoing requirements, the court must declare the rights of the parties whether or not the facts alleged estalbish [sic.] that Plaintiff is entitled to a favorable judgment (Bennett v. Hibernia Bank (1956) 47 Cal.2d 540, 550, 305 P.2d 20; Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal.App.3d 372, 377, 96 Cal.Rptr. 825; Tiburon v. Northwestern Pac. R. R. Co. (1970) 4 Cal.App.3d 160, 170, 173, 84 Cal.Rptr. 469; see also Seitlin v. Arnebergh (1963) 59 Cal.2d 901, 908, 31 Cal.Rptr. 800, 383 P.2d 152). If the plaintiff is not entitled to a favorable determination, the court should render a judgment embodying such determination

and not merely dismiss the action (Maguire V. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719, 731, 146 P.2d 673; Patel v. Athow (1973) 34 Cal.App.3d 727, 734, 110 Cal. Rptr. 460).

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V

CONCLUSION

Based on the foregoing it is clear that the lower court erred in a multitude of areas in granting the Defendants' Motion for Summary Judgment. Therefore, a decision of reversal should be rendered along with remanding this case to the lower court for trial.

DATED: October 27, 1989

Respectfully submitted,

/s/

SEBASTIAN D'AMICO
Attorney for Plaintiff-Appellant
PAUL A. RICHTER, dba
"THE BODY SHOP"

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VERIFICATION

I, SEBASTIAN D'AMICO, Esq., declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California.

2. I am the attorney of record for Plaintiff, PAUL A. RICHTER, dba "THE BODY SHOP".

3. I know the contents of this Brief. The same is true of my own knowledge, except as to the matters which are therein stated on information and belief and as to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true

and correct.

Executed this 27th day of October, 1989, at San Diego, California.

/s/

SEBASTIAN D'AMICO

[-17-]

[PROOF OF SERVICE BY MAIL]

No. 90-818

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

CERTIFICATE OF SERVICE

I, Grant Richard Telfer, declare that I am, and was at the time of service of the papers herein referred to, am the attorney of record in the within action, entitled Paul A. Richter v. The City of San Diego, et al, and am a member of the bar of this Court, representing Respondents City of San Diego and Robert Burgreen. I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 525 B St, Ste. 2100, San Diego, California 92101.

On February 19, 1991, I served the **RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT** on the following by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Sebastian D'Amico
Law Offices of Sebastian D'Amico
2366 Front Street
San Diego, Calif. 92101-1460

Stephen M. Kelly, Clerk
Court of Appeal
Fourth District, Div. One
750 B St, Ste 5000
San Diego, CA 92101

I thereafter sealed and deposited such envelope in a United States mailbox with first-class postage prepaid.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed this 19th day of February, 1991 in San Diego, California.

GRANT RICHARD TELFER, Declarant